BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN SCOTT MOORE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,030,847
SHAWNEE MISSION TREE SERVICE, INC.	)	
Respondent	)	
AND	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 4, 2006 preliminary hearing Order of Administrative Law Judge Steven J. Howard.

ISSUE

Should compensation be disallowed pursuant to K.S.A. 2005 Supp. 44-501(d)(1) for claimant's willful failure to use a reasonable and proper guard and protection voluntarily furnished by the employer?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant suffered very serious injuries on August 1, 2006, when he fell approximately 25 feet from a tree, landing on the ground. Respondent argues that benefits should be disallowed due to claimant's failure to use the safety gear required by respondent on the job.

Claimant had only recently rehired with respondent as a tree "climber." Tree climbers were responsible for going into trees and performing whatever trimming was required to complete a job for respondent. Claimant had worked for respondent several years before and had been a climber in Kansas and other states for several years. He

was considered by respondent's safety and training manager, Glen Jennings, to be a good climber.[1]

Respondent was a very safety conscious employer. Weekly safety meetings were required. The use of safety equipment was emphasized both at hire and throughout the employment period. Claimant was required to watch a safety video and undergo safety training at hire. Daily equipment checks were performed by the workers, with periodic checks being done by the safety and training manager. There is no doubt from this record that safety was a priority with this employer in what can only be described as a very dangerous business.

After the weekly safety meeting, which was coincidently held on the morning of the accident, claimant and his co-workers performed an equipment check and then proceeded to their job for that day. Claimant worked with the crew foreman, Michael Kirby, and the groundsman, Eugenio Salazar. When they arrived at the job, claimant and Mr. Kirby looked at the damaged tree and discussed the manner in which the limb was to be removed. The tree in question was a very large pin oak estimated to have a trunk diameter of 42 inches. A 15-foot ladder was placed against the trunk of the tree, and claimant climbed to the top of the ladder. When there, claimant attempted to attach his buck strap, a safety device which tied around the tree and attached on both sides to claimant's harness. It was then discovered that the buck strap was too small to allow claimant to wear it and scale the tree.

Claimant then attempted to place a climbing rope over a limb, later measured to be 27 feet from the ground. Claimant would normally have used the buck strap to scale the tree and then place the climbing rope over the appropriate limb. Claimant would then use the climbing rope to secure him while working in the tree. As noted above, the ladder claimant was using was only 15 feet long. So claimant was several feet below the target limb and had several feet to go before reaching the area where the tree trimming was to take place.

After claimant realized the problem with the buck strap, he descended the ladder and discussed the situation with Mr. Kirby. Claimant then went back up the ladder and attempted several times to throw the rope over the limb. After several unsuccessful attempts, claimant began ascending the tree using only his boot spikes and his hands. At that time, claimant was not secured to the tree by any safety device. When just below the limb in question, claimant attempted to reach the limb. At that moment, claimant's left boot spike slipped and claimant fell to the ground, suffering extensive closed head and internal injuries. At the time of the preliminary hearing, claimant remained hospitalized in a coma.

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[1] P.H. Trans. at 28.

While there were musings in the record about other tree climbers "free climbing,"[2] no witness testified to ever seeing any tree climber free climbing a tree this size while working for this employer. K.S.A. 2005 Supp. 44-501(d)(1) states:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The burden placed upon an employer by the Kansas Supreme Court with respect to this defense is substantial. As used in this context, the Kansas Supreme Court in *Bersch*[3] and the Court of Appeals in a much more recent decision in *Carter*[4] have defined "willful" to necessarily include:

> . . . the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . 'Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse.'[5]

The mere voluntary and intentional omission of a worker to use a guard or protection is not necessarily to be regarded as willful.[6]

Michael Kirby, claimant's foreman, who was present at the time of this tragic accident, described claimant's actions as a "bad choice" and said claimant just made a mistake.[7] It is obvious that claimant was trying to accomplish his job while using the safety equipment in his possession and on his person. Claimant's decision to free climb, rather than being a willful act, appears more the result of frustration at not being able to accomplish a simple task; i.e., throwing a rope over a tree branch. This Board Member cannot find this claimant's actions to rise to the level of that required by *Bersch* and *Carter*. Rather than being "obstinate," "perverse" or "stubborn," claimant's actions appeared to be

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[2] Climbing a tree without a safety line or rope securing the climber to the tree. (P.H. Trans. at 19.)

[3] *Bersch v. Morris & Co.*, 106 Kan. 800, 189 Pac. 934 (1920).

[4] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[5] *Id*. at 85.

[6] *Thorn v. Zinc Co.*, 106 Kan. 73, 186 Pac. 972 (1920).

[7] Kirby Depo. at 41.

a spur-of-the-moment decision born of frustration and a desire to get the job done. This Board Member finds that claimant should not be denied benefits based upon K.S.A. 2005 Supp. 44-501(d)(1).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Steven J. Howard dated October 4, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

c: Timothy V. Pickell, Attorney for Claimant
Denise E. Tomasic, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[8] K.S.A. 44-534a.